United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 20, 2011

TO: Arly Eggertsen, Acting Regional Director
Region 13

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Rehabilitation Institute of Chicago, 512-5012-0100
Case 13-CA-66487 512-5012-0125

The Region submitted this case for advice as to whether provisions of the Employer's social media policy would reasonably be construed to chill Section 7 protected activity in violation of Section 8(a)(1). We conclude that the portions of the policy that prohibit employees from 1) photographing, recording or providing information about staff for uploading onto public forums or websites; 2) using the Employer's name and/or logo on any websites; and 3) posting confidential information about the Employer or its employees or discussing Employer-related matters on social media, are unlawfully overbroad.

FACTS

The Employer's social media policy states the following:

> RIC respects the privacy, confidentiality and interests of others. . . . **RIC prohibits employees from photographing, recording or providing information regarding** patients, visitors and/or **RIC staff for uploading on any public forums/websites which may include, but are not limited to YouYube, Facebook, or My Space. Furthermore, employees are not allowed to use RIC's name and/or logo on any websites**, set-up an RIC-hosted blog or website, Facebook page or any other social media site related to RIC in any way, without the prior written consent of RIC's Marking and Communications Department, except for posting employees' own name, title and RIC as current employer on social media such as LinkedIn. (Emphasis added) . . . .
>
> Furthermore, **do not post confidential or proprietary information about RIC**, its patients **or employees and do not discuss RIC related matters on social media**. (Emphasis added)

> Any violation of the foregoing is cause for appropriate disciplinary action, up to and including termination of employment.

There is no evidence that any employee has been disciplined under the above-noted policy or that any employees engaged in conduct prohibited under the above-noted policy.

ACTION

An employer violates Section 8(a)(1) of the Act through the maintenance of a work rule if that rule would "reasonably tend to chill employees in the exercise of their Section 7 rights."[1] The Board has developed a two-step inquiry to determine if a work rule would have such an effect.[2] First, a rule is unlawful if it explicitly restricts Section 7 activities. If the rule does not explicitly restrict protected activities, it will violate the Act upon a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.[3]

Rules that are ambiguous as to their application to Section 7 activity, and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights, are unlawful.[4] In contrast, rules that clarify and restrict their scope by including examples of clearly illegal or unprotected conduct, such that they could not reasonably be construed to cover protected activity, are not unlawful.[5]

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[1] *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[2] *Lutheran Heritage Village–Livonia*, 343 NLRB 646, 647 (2004).

[3] *Id*.

[4] See *University Medical Center*, 335 NLRB 1318, 1320-1322 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003) (work rule that prohibited "disrespectful conduct towards [others]" unlawful because it included "no limiting language [that] removes [the rule's] ambiguity and limits its broad scope.")

[5] See *Tradesmen Intl.*, 338 NLRB 460, 460-62 (2002) (prohibition against "disloyal, disruptive, competitive, or damaging conduct" would not be reasonably construed to cover protected activity, given the rule's focus on other clearly illegal or egregious activity and the absence of any application against protected activity); *Sears Holdings*, Case 18-CA-19081, Advice Memorandum dated December 4, 2009 (lone reference to "disparagement" was made in context of prohibition against serious misconduct, such as use of obscenity, illegal drugs, and discriminatory language).

Initially, the portion of the rule prohibiting employees from photographing, recording or providing information about staff for uploading onto public forums or websites is unlawful. As to the prohibition against providing information regarding staff, employees have a Section 7 right to discuss their wages and other terms and conditions of employment.[6] A rule that precludes employees from sharing information about themselves or their fellow employees with each other or with non-employees regarding those subjects violates Section 8(a)(1).[7] Here, nothing clarifies or narrows the scope of the prohibition so as to exclude Section 7 activity. Absent such limitations or examples of what is covered, the rule would reasonably be interpreted as prohibiting employees' right to discuss coworkers' wages and other terms and conditions of employment. As to prohibiting employees from photographing or recording employees for any public forums or websites, such a prohibition would reasonably be interpreted to prevent employees from using social media to communicate and share information regarding their Section 7 activities through pictures, such as of employees engaged in picketing or other concerted activities.[8]

We further find unlawful the portion of the rule prohibiting employees from using the Employer's name and/or logo. Employees would reasonably understand the rule to prohibit the use of the Employer's logo or trademark in

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[6] *Cintas Corp.*, 344 NLRB 943 (2005), *enforced,* 482 F.2d 463 (D.C. Cir. 2007) (rule's unqualified prohibition of the release of any information regarding its employees could reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment with their fellow employees and with the union); *Double Eagle Hotel & Casino*, 341 NLRB 112, 114-115 (2004), *enforced,* 414 F.3d 1249 (10th Cir. 2005), *cert. denied,* 546 U.S. 1170 (2006) (rule that expressly prohibited disclosure of wages and working conditions violated Section 8(a)(1)).

[7] *Double Eagle Hotel & Casino*, 341 NLRB at 114-115; *Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or their fellow employees' salaries with anyone outside the company); *University Medical Center*, 335 NLRB at 1322 (rule prohibiting disclosure of confidential information concerning patients or employees); *Labinal, Inc.*, 340 NLRB 203, 210 (2003) (policy prohibiting one employee from discussing another employee's pay without the latter's knowledge and permission); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 n.3, 291-92 (1999) (rule prohibiting employees from revealing confidential information regarding fellow employees, hotel's customers, or hotel's business).

[8] *See, e.g., Sullivan, Long & Hagerty*, 303 NLRB 1007, 1013 (1991), *enforced,* 976 F.2d 743 (11th Cir. 1992) (employee tape recording at jobsite to provide evidence in a Department of Labor investigation considered protected). *Contrast with Flagstaff Medical Center,* 357 NLRB No. 65, slip op. at 4-5 (August 26, 2011) (holding lawful rule prohibiting employees from taking photographs of hospital patients or property in light of "weighty" privacy interests of hospital patients and "significant" employer interest in preventing wrongful disclosure of individually identifiable health information).

their online Section 7 communications, which could include electronic leaflets, cartoons, or even photos of picket signs containing the Employer's logo.[9] Although the Employer has a proprietary interest in its trademarks, including its logo if trademarked, employees' use of its name, logo, or other trademark while engaging in Section 7 activity would not infringe on that interest. Courts have identified three interests that are protected by the trademark laws: (1) the trademark holder's interest in protecting the good reputation associated with his mark from the possibility of being tarnished by inferior merchandise sold by another entity using the trademark; (2) the trademark holder's interest in being able to enter a related commercial field at some future time and use its well-established trademark; and (3) the public's interest in not being misled as to the source of products offered for sale using confusingly similar marks.[10] The touchstone of trademark infringement is "likelihood of confusion" that the product sold by the second entity is the product of the trademark holder. These interests are not remotely implicated by employees' non-commercial use of a name, logo, or other trademark to identify the Employer in the course of engaging in Section 7 activity related to their working conditions. Moreover, even if trademark principles were applicable to this kind of use, there is no unlawful infringement where use of a trademark would not confuse the public regarding the source, identity, or sponsorship of the product.[11]

Finally, the rule prohibiting employees from posting confidential information about the Employer or its employees, or discussing Employer-related matters on social media, is also unlawfully overbroad. As to prohibiting employees from posting confidential information about the Employer or other employees, the Board has long recognized that the term "confidential information," without narrowing its scope so as to exclude Section 7 activity, would reasonably be interpreted to include information concerning terms and conditions of employment.[12] The prohibition against

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[9] *Cf. Pepsi-Cola Bottling Co.*, 301 NLRB 1008, 1019-20 (1991), *enforced sub nom.*, *Pepsi-Cola Bottling Co. v. NLRB*, 953 F.2d 638 (4th Cir. 1992)(finding unlawful prohibition against employees wearing company logo or insignia while engaging in union activity during non-working time away from the plant).

[10] See *Scarves by Vera*, 544 F.2d 1167, 1172 (2d Cir. 1976).

[11] See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d at 565, 569 (use of trademark in an advertisement comparing the alleged infringer's product to the trademark holder's product not unlawful because it did not create a reasonable likelihood that purchasers would be confused as to the source, identity, or sponsorship of the advertiser's product).

[12] See, e.g., *University Medical Center*, 335 NLRB at 1320, 1322 (employees "might reasonably perceive terms and conditions of employment, including wages, to be within the scope of the broadly-stated category of 'confidential information' about employees"); *Cintas Corp.*, 344 NLRB at 943

employees discussing Employer-related matters is similarly unlawful because such a broad term would clearly be construed to include subjects involving employees' workplace and their terms and conditions of employment.[13]

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(confidentiality rule would reasonably be construed by employees to restrict discussion of wages and other terms and conditions of employment); *Bigg's Foods*, 347 NLRB at 425 fn.4 (confidentiality rule prohibiting employees from discussing their own or their fellow employees' salaries outside the company unlawful because employees would reasonably construe it as prohibiting Section 7 activity).

[13] See *Freemont Manufacturing Co.*, 224 NLRB 597, 603-604 (1976) (finding overly broad rule prohibiting employees from "[m]aking any statement or disclosure regarding company affairs, whether express or implied as being official, without proper authorization from the company"); *Pontiac Osteopathic Hospital*, 284 NLRB 442, 465–466 (1987) (unlawful rule prohibiting employees from discussing hospital affairs).